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NORTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEE-RAY TARANTINO CO., INC., d/b/a  
GOLDEN STATE PRODUCE CO.

Plaintiff

v.

THEODORAS KOLIATISIS, d/b/a/  
4<sup>TH</sup> & GEARY FARMERS MARKET

Defendant

Civil Action No: 07 5705

**MEMORANDUM OF POINTS  
AND AUTHORITIES  
IN SUPPORT OF EX PARTE  
APPLICATION FOR  
TEMPORARY RESTRAINING  
ORDER AND ORDER TO SHOW  
CAUSE RE PRELIMINARY  
INJUNCTION**

Plaintiff, Lee-Ray Tarantino Co., Inc. d/b/a Golden State Produce, submits this memorandum in support of its Application for Temporary Restraining Order Without Notice and Order to Show Cause Why a Preliminary Injunction Should Not Issue pursuant to Fed. R. Civ. P. 65 and Preliminary Injunction. Submitted herewith in support of plaintiff's applications are the declaration of the representative of plaintiff and the certification of plaintiff's attorney as to why notice is not required.

## INTRODUCTION

Plaintiff is engaged in the business of selling wholesale quantities of perishable agricultural commodities (hereafter "produce") in interstate commerce.

Defendant, Theodoras Koliatsis, an individual doing business as 4th & Geary Farmers Market ("4th & Geary"), in San Francisco, California, and is and was at all times pertinent herein, a dealer of produce subject to license under the Perishable Agricultural Commodities Act, 7 U.S.C. §499a, et seq., ("PACA").

Plaintiff seeks enforcement of the statutory trust established under the PACA, 7 U.S.C. §499e(c), and the regulations issued pursuant thereto, 7 CFR Part 46, 49 Fed. Reg. 45735 (Nov. 20, 1984) (the "PACA regulations"). The Court's jurisdiction is invoked pursuant to 7 U.S.C. §499e(c)(5)(I).

## THE PACA TRUST

The PACA was enacted in 1930 to "suppress unfair and fraudulent practices in the marketing of fruits and vegetables in interstate and foreign commerce" and "provides a code of fair play . . . and aid to [agricultural] traders in enforcing their contracts." 49 Fed. Reg at 45737.

In 1984, the PACA was amended to assure that suppliers of produce are paid by imposing a statutory trust on all produce-related assets, such as the produce itself or other products derived there from, as well as any receivables or proceeds from the sale thereof, held by agricultural merchants, dealers and brokers. 7 U.S.C. §499e(c)(2). Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc., 222 F.3d 132 (3<sup>rd</sup> Cir. 2000); Friedman v. Ice, S.A. v. Sunfruit, Inc., 918 F.2d 154 (11th Cir. 1990). The trust must be maintained

1 for the benefit of the unpaid suppliers, sellers or agents who provided the commodities  
2 until full payment has been made. Id. The trust provisions thus offers sellers of  
3 produce, "a self-help tool that will enable them to protect themselves against the  
4 abnormal risk of losses resulting from slow-pay and no-pay practices by buyers or  
5 receivers of fruits and vegetables." 49 Fed. Reg. at 45737.

7 Failure to maintain the trust and make full payment promptly to the trust  
8 beneficiary is unlawful. 7 U.S.C. §499b(4). Produce dealers "are required to maintain  
9 trust assets in a manner that such assets are freely available to satisfy outstanding  
10 obligations to sellers of perishable agricultural commodities[,]" and any act or omission  
11 inconsistent with this responsibility, including dissipation of trust assets, is proscribed. 7  
12 CFR §46.46(e)(1). Dissipation of trust assets, defined as the diversion of trust assets or  
13 the impairment of a seller's right to obtain payment (7 CFR §46.46(b)(2)), is forbidden.  
14 7 CFR §46.46(e)(1).

17 ENTITLEMENT TO TEMPORARY  
18 RESTRAINING ORDER

19 Rule 65(b) of the Federal Rules of Civil Procedure sets forth the standard under  
20 which a temporary restraining order may be issued without notice.

21 A temporary restraining order may be granted without written or oral notice to the  
22 adverse party or that party's attorney only if (1) it clearly appears from specific facts  
23 shown by declaration or by the verified complaint that immediate and irreparable injury,  
24 loss, or damage will result to the applicant before the adverse party or that party's  
25 attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court  
26 in writing the efforts, if any, which have been made to give the notice and the reasons  
27 supporting the claim that notice should not be required.  
28

1 In this case, plaintiff, through the declaration of its representative, as well as the  
2 Certification of Counsel, has demonstrated that: a) it is a produce dealer and creditor of  
3 defendant under PACA; b) it has not been paid for the \$328,344.36 worth of produce  
4 that it sold to defendant; c) defendant has tendered four (4) checks to plaintiff in the  
5 aggregate amount of \$76,000.00 in partial payment for the produce supplied by plaintiff,  
6 which were returned by the bank due to insufficient funds; and d) giving defendant  
7 notice before entry of a Temporary Restraining Order will allow defendants to further  
8 dissipate PACA trust assets pending a hearing.  
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11 Such notice will only provide defendant with advance warning that an order may  
12 be entered, thereby giving time to defendant to: a) sell or transfer trust assets; and/or b)  
13 make further payments of trust assets to liquidate personal liabilities or pay preferred  
14 non-trust creditors prior to the entry of the order. Thus, a further loss of trust assets  
15 would result if there is notice. Since it is all but impossible to recover trust assets once  
16 there has been dissipation, H.R. Rep. No. 543, 98th Cong., 2d Sess. 4 (1983), reprinted  
17 in 1984 U.S. Code Cong. & Admin. News, 405, 411, Tanimura & Antle, Inc. v. Packed  
18 Fresh Produce, Inc., supra, p. 140; J.R. Brooks & Son, Inc. v. Norman's Country Market,  
19 Inc., 98 B.R. 47, 50 (Bkrtcy. N.D. Fla. 1989), the loss to plaintiff and other trust creditors  
20 would be irreparable. DiMare Fresh Fruit v. Thomas J. Gatziolis & Co., 774 F.Supp.  
21 449 (N.D. Ill. 1991); Gullo Produce Co., Inc. v. Jordan Produce Co., Inc., 751 F.Supp.  
22 64 (W.D. Pa. 1990).  
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25 In addition, defendant has the power to obtain immediate dissolution of the  
26 Temporary Restraining Order by payment to plaintiff of the trust moneys that are owed.  
27 Alternatively, a prompt hearing will be held on plaintiff's motion for preliminary  
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1 injunction, and defendant can file an immediate application to dissolve the temporary  
2 restraining order under Rule 65(b). In the meantime, the status quo is maintained  
3 because no assets can be transferred or dissipated.  
4

5 Case law supports plaintiff's entitlement to an immediate injunction requiring non-  
6 dissipation of trust assets when the produce supplier is not paid. Tanimura & Antle, Inc.  
7 v. Packed Fresh Produce, Inc., supra, p. 140 (irreparable injury established and  
8 injunction should issue upon a showing that the trust was depleted and payment was  
9 not readily forthcoming); Frio Ice, S.A. v. Sunfruit, Inc., supra, p. 159; ("Upon a showing  
10 that the trust is being dissipated or threatened with dissipation, a district court should  
11 require the PACA debtor to escrow its proceeds from produce sales, identify its  
12 receivables, and inventory its assets."); Dole Fresh Fruit Co. v. United Banana Co., 821  
13 F.2d 106 (2d Cir. 1987); In re Richmond Produce Co., Inc., 112 B.R. 364, 367 (Bkrcty.  
14 N.D. Cal. 1990).  
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17 The standard for granting injunctive relief in the Ninth Circuit requires the moving  
18 party to show: (1) a strong likelihood of success on the merits; (2) irreparable harm if the  
19 relief is not granted; (3) that the threatened injury to the movant outweighs whatever  
20 damage the proposed injunction may cause to the opposing party; and (4) the issuance  
21 of the injunction will not be adverse to the public interest. Regents of University of  
22 California v. ABC, Inc., 747 F.2d 511, 515 (9th Cir. 1984); Los Angeles Memorial  
23 Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980).  
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25 The facts in this case show that the plaintiff is entitled to the requested relief.  
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1 Finally, no bond should be required because defendant already has \$328,344.36  
2 worth of trust assets from plaintiff as security for the issuance of a Temporary  
3 Restraining Order.  
4

5 CONCLUSION

6 For the foregoing reasons, plaintiff respectfully submits that its Motion for  
7 Temporary Restraining Order Without Notice should be granted.

8 Dated this 9<sup>th</sup> day of November, 2007.

9 DUDNICK, DETWILER, RIVIN & STIKKER, LLP  
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